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10/697,767	10/30/2003	Andrew Schydlofsky	15651-002001	8887

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FISH & RICHARDSON P.C.  
PO BOX 1022  
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EXAMINER
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WEISBERGER, RICHARD C

ART UNIT	PAPER NUMBER
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3693

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/697,767  
Filing Date: October 30, 2003  
Appellant(s): SCHYDLOWSKY, ANDREW

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Teresa Lavoie  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 8/18/2008 appealing from the Office action mailed 10/18/2007.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

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**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term powder is indefinite in scope. A reading of the independent claim shows that the powder can comprise any (or combinations) of a protein, peptide, amino acid, carbohydrate, electrolyte, and/or an herb and it is the examiners position that in view of the markush group that the term powder is more a term of degree (e.g., small or large) than a term of pre-defined scope. Moreover, there is nothing in the specification that further defines this protein, peptide, amino acid, carbohydrate, electrolyte, and/or an herb powder.

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Claims 26-29,31,33,34, and 46-49 rejected under 35 U.S.C. 102(b) as being anticipated by 2002/0150658.

The reference teaches a kit, along with the limitations of claims 31,33,34,46-49 comprising a dietary supplement product, wherein the dietary supplement product is a powder comprising one or more of a protein, peptide, amino acid, carbohydrate, electrolyte, herb, or combination thereof; and at least one additive, wherein the additive is packaged separately from the dietary supplement product. [Morrisette paragraph 0004, paragraph 0010 teaching a ready to eat cereal, which the examiner reads on a powder];

wherein the at least one additive when combined with the dietary supplement product, at a time after the manufacture of both the dietary supplement product and the additive, alters a characteristic of the dietary supplement product. [paragraph 10];

wherein the flavorant is selected from a group consisting of vanilla, chocolate, butterscotch, peanut butter, mocha, strawberry, banana, peach, orange, cherry, blueberry, raspberry, mango, apple, pineapple, grape, mint, caramel, cinnamon and combinations thereof. [paragraph 10, teaching a fruit];

### **(10) Response to Argument**

#### **112nd Rejection**

The applicant argues that the "ordinary" and "customary" meaning of the terms for one having ordinary skill in the relevant art of nutritional supplement products would understand the scope of the term "powder" and would interpret the term "powder" consistently with the generally accepted definition of the term to mean a substance consisting of ground or finely divided or dispersed solid particles. A reading of the independent claim shows that the powder can comprise any (or combinations) of a protein, peptide, amino acid, carbohydrate, electrolyte, and/or an herb and it is the examiners

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position that in view of the markush group that the term powder is more a term of degree (e.g., small or large) than a term of pre-defined scope. Moreover, there is nothing in the specification that further defines this powder of protein, peptide, amino acid, carbohydrate, electrolyte, and/or an herb.

#### 102 Rejection

The applicant argues two points.

The applicant argues that the prior art ready to eat cereal in any form does not read on a "dietary supplement" nor a "powder". The applicant provides no support in the specification for their the meanings of theses terms rather they just argue what these terms are not (that cereal of the primary reference) While as set forth above the examiner can not be sure what the scope of a protein, peptide, amino acid, carbohydrate, electrolyte, and/or an herb powders, Clearly, the genus term of ready to eat cereals includes forms that read on species that includes protein/carbohydrate powders, such as baby hot rice cereals.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Richard C. Weisberger

/Richard C Weisberger/

Conferees:

James Kramer /J. A. K./

Supervisory Patent Examiner, Art Unit 3693

Alex Kalinowski/A. K./

Supervisory Patent Examiner, Art Unit 3691